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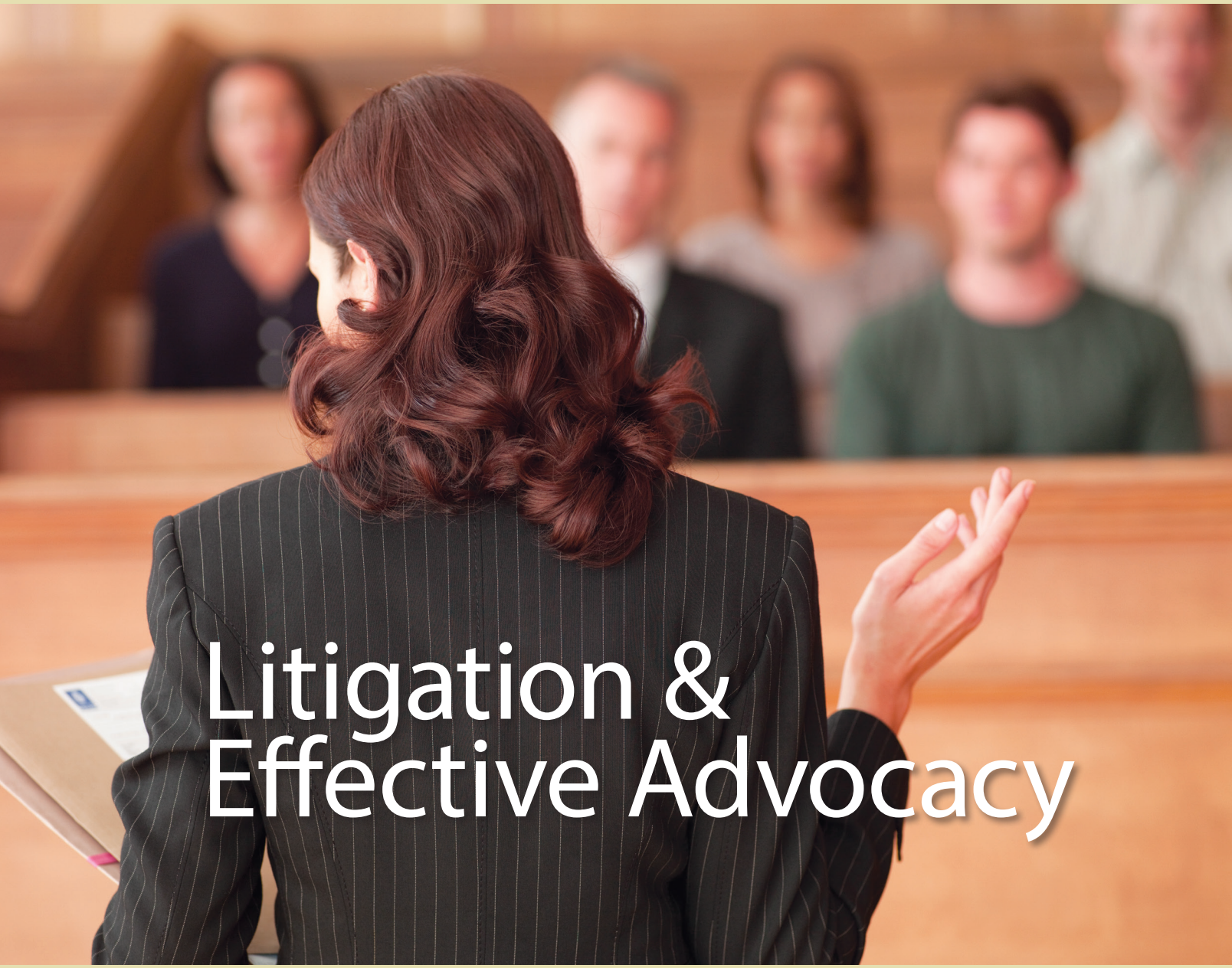

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Preparation is the Key

to a Rewarding and Successful Mediation

BY THEODORE K. CHENG, ESQUIRE

Mediation is a confidential process in which the parties to a dispute engage a neutral, disinterested third party who facilitates discussion to assist them in arriving at an informed and mutually consensual resolution. A mediation can be rewarding and successful if attorneys and clients prepare for the various stages of the process and if the client's expectations are managed in advance. The more all parties know about what will likely happen during a mediation process, the higher the likelihood that a resolution can be achieved. Those newer to the field probably have not had much experience with mediation, so here are some things to consider as you prepare for the process.

First, the client needs to understand the nature of a mediation process and especially how it differs from litigation. Naturally, the parties most directly affected by a dispute are, given the right circumstances, the ones best able to resolve it. Therefore, mediation is based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to both the process and the outcome. To assist in that endeavor, the nature and design of a mediation process is completely flexible and can be tailored to meet the specific needs of the parties and their dispute. In some cases, having the parties together in a joint session at the beginning of a mediation can be a fruitful way to start a dialogue

and, perhaps, the healing process. In other cases, keeping the parties apart from each other is more conducive to making progress toward a productive and meaningful resolution. These and other design issues should be carefully considered by both attorney and client, as well as discussed with the other party and attorney, along with the mediator.

By contrast, the litigation forum presents several limitations, including the lack of real flexibility in designing a mechanism for resolution tailored to the dispute in question; the additional expense (in time and legal fees) of appearing before a decision-maker with possibly little to no expertise in the subject matter of the dispute; the inability to maintain true confidentiality because of the public nature of the proceedings; and, perhaps most poignantly, the frustration of having no control over the timing of the process and when relief can be afforded. Unlike litigation, mediation is a non-adjudicative process. There is no judge or other decision-maker who will determine the merits of the dispute. Rather, a mediator selected jointly by the parties conducts the proceedings with an eye toward trying to improve communications between the parties, explore possible alternatives, and address the underlying interests and needs of the parties in hopes of moving them toward a negotiated settlement or other resolution of their own making.

To that end, selecting the appropriate mediator is an important aspect of the process that is oftentimes critical to maximizing the likelihood that a resolution can be achieved. The parties could opt to select a mediator who is well-versed in mediation process skills and/or someone who is an "expert" familiar with the subject matter of the dispute, the industry, or background business norms in which the dispute arose or in the legal framework governing the dispute itself. Additionally, while litigation generally looks to past events to find fault and impose appropriate relief, mediation focuses on the future to determine how the parties can best resolve the pending dispute and move on. Moreover, usually by statute, rule, or case law, mediation is a confidential process, which generally means that any communications made during the mediation cannot be used or disclosed outside of the mediation. It also means that ex parte communications with the mediator are kept confidential from the other participants unless consent has been given. Confidentiality is another bedrock principle of mediation because it helps foster open, honest, and candid communications with the mediator, if not also with the other participants.

Second, the attorney and the client both need to be prepared for a change in mindset from an adversarial posture to one that is more cooperative and collaborative. In litigation, a party advocates for positions while simultaneously trying to undermine the other party's positions. By contrast, mediation is prospective in nature and tries to help put parties on a path to a resolution for mutual benefit. Moreover, parties to a dispute oftentimes are unable to engage in negotiations toward a resolution because the dispute has triggered the emotional, sometimes irrational, part of the brain (the amygdala) and is interfering with the thinking, rational decision-making part of the brain (the neocortex). For a resolution to be achieved, human brains need to shift and change from the former to the latter. Unless and until the conflict between those different parts of the brain is resolved, a complete resolution of the dispute is not likely.

Mediation can be a process that helps parties undergo that shift and change, and one of the skills of a mediator is to help parties do that. In the context of a mediation, an expression of concern for the injury or pain suffered by the other party need not be accompanied by any admission of fault or agreement with the other party's positions. There is nothing inconsistent with a party holding a strong conviction about its positions, while also recognizing that continued litigation typically means spending more money, more time, and more emotional capital to achieve an outcome over which the party has increasingly less and less control.

Third, attorneys and their clients need to spend the time and effort to provide the other participants and the mediator with sufficient information not only about the dispute, but also about the factors that may affect how a resolution could be achieved. Oftentimes, the parties will agree to undergo a mediation process without enough information in hand about each other's respective positions and interests. A mediator can assist the attorneys in structuring a limited, informal exchange of documents and information that will help each party better understand the parameters of the dispute and what positions each party is taking and why. This can also help each party undertake a more serious, balanced, and informed evaluation of both the merits of the dispute and an appropriate valuation for resolution purposes.

Most mediators will also ask the parties to submit additional information in advance of the mediation session, either on an ex parte basis or exchanged with each other. This is a tremendous advocacy

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opportunity to address the client's perspectives about liability and damages; the client's interests and concerns regarding the dispute; the client's reasonable proposals for a resolution, including any non-monetary proposals; the status of any prior settlement discussions; and any other information that might be relevant for the mediator and/or the other party to know. The submission can also address some fundamental questions, such as what is at the core of the dispute; what is preventing the dispute from resolving, identifying any potential roadblocks, barriers, or impasses to a resolution; and what would need to happen to resolve the dispute, such as any specific conditions, or must-haves, that need to be a part of any resolution. The submission is also an opportunity to alert the mediator and/or the other party about any cultural issues that could impair the mediator's ability to develop a rapport with the parties, impede the receipt/flow of communications and information during the mediation, or otherwise interfere with the mediator's attempt to create an environment conducive to cooperation and collaboration. To the extent that the submission is shared with the other party (even if only in a redacted form), it will begin the process of educating the other party about the client's positions, interests, and needs and, in the process, help move the dialogue forward. The more the other party understands and appreciates the strengths of the case (as perceived by the attorney and the client), as well as the interests and needs of the client, the more likely that progress can be made at the mediation session. Taking full and serious advantage of the pre-mediation submission is an opportunity not to be missed.

Fourth, the client needs to be prepared to participate in the mediation process. Unlike with meet-and-confer conferences with opposing counsel or an argument or trial in a courtroom, a client should not sit idly by at a mediation while the attorney handles the proceedings. Mediation requires a client to be actively engaged in the process and participate by helping the mediator (if not also the other participants) better understand what interests, concerns, needs, feelings, and motivations are underlying the adversarial positions being taken in the dispute. Clients and their representatives should be familiar with the background facts of the dispute, be able to answer questions from the mediator (who will typically be gathering and assimilating the basic facts during the early portions of the mediation session), and be involved in re-evaluating positions as new information comes to light during the mediation. Active participation by the client is critical to the success of a mediation.

Fifth, all mediation participants should take advantage of the flexibility that mediation affords to exercise the opportunity to be creative and truly think outside the box. Much too often, attorneys and their clients come to mediations focused on a resolution based solely upon monetary terms. They fail to recognize that mediations—which are, at their core, a type of facilitated negotiation—can be at their most efficacious when the concepts of integrative negotiation (or principled bargaining) are employed. As explained in the seminal work "Getting to Yes" by Roger Fisher and William Ury, integrative negotiation techniques allow the parties to uncover and identify the real underlying interests and needs behind the positions the parties are espousing; determine how to articulate such interests and needs to each other; and creatively search for and develop options for mutual gain that integrate those various interests and needs. By focusing on the problem at hand, rather than the people who brought the dispute forward, mediation affords the participants the opportunity to explore any number of potential solutions. And because these solutions will eventually be embodied by a voluntary, consensual, and informed agreement between the parties, they can accomplish objectives that an adjudication cannot because a court or arbitrator is usually constrained by the legal framework to provide only certain kinds of relief. Creative and innovative thinking are highly encouraged in a mediation.

Finally, and perhaps most importantly, attorneys and clients should be prepared to spend enough time to allow the mediation process to unfold and, thereby, reap its benefits. Mediation is a marathon, not a sprint, and progress toward a resolution can only be made if the participants are willing to engage with the mediator, if not with each other, and undergo the steps necessary in an integrative bargaining process. A mediator needs to set the appropriate tone and establish a rapport with the participants, giving them the opportunity to be heard. In turn, doing so will allow the participants to truly hear any observations the mediator offers about the dispute, the parties' respective positions, and the proposed resolutions.

Moreover, although a mediator may be asked to recommend possible solutions, a mediator is not authorized to impose a resolution, but, rather, provides an impartial perspective on the dispute to help the

parties satisfy their best interests while uncovering areas of mutual gain. In that respect, mediation can be particularly helpful in those situations in which the parties either are not effectively negotiating a resolution on their own or have arrived at an impasse. Not only does all of this take some time to develop, but it helps shift the brain from the emotional/irrational part to the thinking/rational decision-making part. The participants in a mediation need to be realistic about their expectations of the process for it to be as rewarding and successful as possible.

Attorneys oftentimes treat mediations as just another extension of the litigation process, where their finely honed legal skills—sharpened for the inevitable adversarial battles inherent in discovery and trial—will simply be put to good use before the mediator. But a mediator is not the adjudicator of the dispute, and mediation is an entirely different process altogether. Thus, preparing for a mediation requires a different set of skills, a different mindset, and, as in all effective advocacy, proper representation and solid preparation in advance. ◆

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